

OGC 75-3364
OLC 75-2268
S 796-800

12 September 1975

OGC Has Reviewed

MEMORANDUM FOR: Legislative Counsel

SUBJECT : Applicability of Administrative Practices Act to CIA

REFERENCES : A. Note to General Counsel from [] dated
27 August 1975, same subject;
STATINTL B. Note to Deputy General Counsel from []
STATINTL dated 2 September 1975, same subject;
STATINTL C. Draft letter from [] to Chairman, Senate
Committee on the Judiciary, dated 2 September 1975.
Subject: S. 796-S.800.

1. Referent notes state that each year numerous bills are proposed to amend the Administrative Procedure Act, 5 U.S.C. 551-559. As a direct result, OLC and OGC must spend considerable time examining whether such proposed amendments would impact on this Agency. Reference C states that "[a]s a practical matter ... the provisions of the Administrative Procedures Act have no applicability to the Central Intelligence Agency, except for sections 552 and 552a of title 5." It is suggested that this conclusion represents a definitive finding that the Administrative Procedures Act does not apply to CIA with the exception of the Freedom of Information and Privacy sections of the Act and that if this view can be accepted, then in the future countless hours of work could be saved by both Offices. Although the statement in the draft letter is correct, the optimistic conclusions drawn therefrom are less supportable.

2. It is, of course, true that the Administrative Procedure Act is addressed primarily to those regulatory agencies whose rule making, ratemaking, licensing, and adjudication affects industries and private individuals. The Federal Communications Commission, the Federal Trade Commission, and the Securities and Exchange Commission immediately come to mind. It is equally true that the functions of the Central Intelligence Agency as set out in 50 U.S.C. 403 do not include such regulatory activity, being limited to duties related to foreign intelligence affecting the national security. Nevertheless, there is a significant difference between saying that as a practical matter the Administrative Procedure Act does not have applicability to CIA and saying that the Administrative Procedure Act does not apply to CIA. In point of fact, the Act applies to every agency of Government and there is no specific or blanket exemption for CIA.

3. The Act in section 551 defines "rule," "rule making," "order," and "adjudication" as follows:

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

4. It is clear from the above definitions that CIA arguably engages in both rule making and adjudication. The reason that CIA has not needed to be concerned with the Administrative Procedure Act in the past was that certain types of rule making and adjudication is exempted. Section 553 which deals with rule making states:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

Similarly, section 554 which deals with adjudication exempts in subsection (a):

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(4) the conduct of military or foreign affairs functions;

5. To the extent that any Agency actions which fall within the definition of rule making and adjudication also fall within the allowable exemptions in sections 553 and 554, the procedures set forth in the Administrative Procedures Act may be disregarded. It does not seem prudent, however, to ignore bills which would change the definitions in section 551 or the exemptions listed in sections 553 and 554.

STATINTL



Office of General Counsel